Supreme Court, U.S.
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92-2026

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

VISTA PAINT CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY, AIR RESOURCES BOARD, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, SAN DIEGO AIR POLLUTION CONTROL DISTRICT,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The government brought a civil penalty action under the Clean Air Act against a paint company. For lack of subject matter jurisdiction, the court granted government pleading motions and struck the company's defenses relating to the invalidity under state law of the state regulations which were being federally enforced. Thereafter, the district court granted a summary judgment in favor of the government, even though the government had incorrectly moved to enforce a repealed version of the Act. On rehearing, which was conducted under the current and correct version of the Act, the court accepted new evidence and argument submitted by the government, and made amendments to its prior ruling, as proposed by the government, but refused to consider the company's contentions on the same new issues. As a result of these rulings, the company never had a hearing on its invalidity defenses, nor on the issues raised under the new Act. The questions presented here are these:

1. Does Section 307 of the Act divest a district court of subject matter jurisdiction in a civil penalty action to entertain the defense of invalidity of the regulations being enforced on the ground they had originally been adopted in violation of state law?

2. Does the Due Process Clause of the Fifth Amendment of the Constitution prohibit a one-sided rehearing of a defective summary judgment in which the court accepts evidence and arguments of the prevailing party on new issues, and the judgment is modified in an effort to cure the prior defects, but refuses to consider the contentions of the losing party on the same issues?

RULE 29.1 LIST

Petitioner Vista Paint Corporation has no parent company nor any non-wholly owned subsidiary.

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Fifth Amendment 2

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Vista Paint Corporation ("Vista") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit (the "Memorandum"), reproduced as Appendix A, was not reported. The Order denying the appellees' petition for rehearing on penalty issues is reproduced as Appendix G. The Order denying Vista's petition for rehearing on liability issues and rejecting its suggestion for rehearing *en banc* is reproduced

as Appendx H. The rulings of the United States District Court for the Central District of California, reproduced as Appendices B through F, were not reported.

JURISDICTION

The Opinion was filed and judgment entered on September 24, 1992. The Order denying Vista's petition and suggestion was filed on March 22, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part, as follows: "No person shall . . . be deprived of . . . property without due process of law."

Section 307(b)(1) of the Clean Air Act (the "Act"), 42 U.S.C. § 7607(b) (as amended November 15, 1980), provides, in relevant part, as follows:

> "(1) A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval or action appears in the Federal Register . . .
>
> "(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil proceedings for enforcement. . . ."

Section 307(d)(1)(B) of the Act, 42 U.S.C. § 7607 (d)(1)(B), provides, in relevant part, as follows:

> "This subsection applies to . . . the promulgation or revision of an implementation plan by the Ad-

ministrator under section 7410(c) of this title . . . The provisions of . . . section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies . . ."

Section 307(d)(8) of the Act, 42 U.S.C. § 7607 (d)(8), provides, in relevant part, as follows:

"The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule."

Section 113(e) of the Act, 42 U.S.C. § 7413(e) (as amended November 15, 1990), provides, in relevant part, as follows:

"(1) In determining the amount of any penalty to be assessed under this section . . . the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with . . . actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

"(2) A penalty may be assessed for each day of violation. For purposes of determining the number of days of violation for which a penalty may be assessed under subsection (b) . . . of this section . . ., where the Administrator . . . has notified the source of the violation, and the plaintiff makes a prima

facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each and every day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature."

STATEMENT OF THE CASE

A. Background

Gloss and semi-gloss oil-based enamel house paints contain paint thinner, or mineral spirits. Paint thinner is one of thousands of compounds known to air pollution control regulators as a volatile organic compound ("VOC"). Regulators call such enamels "non-flat" coatings. VOCs, including those from non-flat paints, can contribute to the formation of ground-level ozone in certain urban areas on hot summer days. The control of emissions of VOC and other ozone precursors has been a central focus under the Act. Traditional enamels contain 380 or more grams per liter ("g/l") of VOC.

This case arises out of a jurisdictional dispute between California clean air regulators, on the one hand, and federal regulators, on the other, over the wisdom of regulations imposing a 250 g/l limit on VOCs in non-flat coatings, and over the proper time to implement any such limit in California's urban areas. Such a limit effectively outlaws traditional oil-based enamels. State and local officials had fixed an effective date at September 1, 1985, but later extended that deadline several years. The California paint industry, including Vista complied with the amended deadline. Federal officials, however, later contended that the earlier deadline, although it had been

repealed at the state level, remained federally enforceable.

The Act, as in effect in the 1980s, provided that control of air pollution was the primary responsibility of state and local government. Former 42 U.S.C. § 101 (a)(3). It also provided that nothing in the Act shall preclude or deny the right of state and local government to adopt or enforce any requirement respecting control or abatement of air pollution. *Id.* at § 116.[1] Under the California Health and Safety Code (the "Code") regulating certain non-vehicular sources of air pollution was the primary responsibility of local and regional districts, including respondents South Coast Air Quality Management District ("SCAQMD") and San Diego Pollution Control District ("SDAPCD"). Code §§ 39002, 40001. The Act directed each state to adopt a state implementation plan ("SIP") consisting, in part, of current district rules. 42 U.S.C. § 7410. Respondent California Air Resources Board ("ARB") approved local rules as SIP revisions. Code §§ 39602, 40460-46469.5, 41500-41507, 41600-41652. The Act required respondent Environmental Protection Agency ("EPA") to approve any SIP revision meeting certain requirements. Former 42 U.S.C. §§ 7410(a)(3)(A).

B. The Earlier Repealed Regulations

On March 16, 1984 SCAQMD adopted the ninth version (in seven years) of its Rule 1113. Section (a)(1) thereof provided, in relevant part, as follows:

> A person shall not sell, offer for sale, or apply any architectural coating . . . which:
>
> "(A) contains more than 250 grams of volatile organic compounds per liter of coating . . . or

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[1] These provisions substantially survived the November 15, 1990 amendments to the Act. But now EPA, in addition, has certain direct responsibility over paints and other consumer or commercial products. 42 U.S.C. § 7511b(e).

> "(B) contains more than 380 grams of volatile organic compounds per liter of coating . . ., is defined as non-flat coating, and is manufactured prior to September 2, 1985 . . . ."

At the same time SDAPCD adopted a revised version of its similar Rule 67.0. Section (d)(2) thereof provided, in pertinent part, as follows:

> ". . . [A] person shall not sell, offer for sale, or apply any nonflat architectural coating having, at the time of sale or manufacture, a volatile organic compound content . . . in excess of the following:
>
> (i) 380 grams of volatile organic compounds per liter of coating if manufactured . . . prior to September 1, 1985.
>
> (ii) 250 grams of volatile organic compounds per liter of coating if manufactured on or after September 1, 1985. . . ."

Each of SCAQMD and SDAPCD submitted its 1984 rule version to ARB as a SIP revision, and ARB approved each.[2] EPA approved both, along with those of numerous other districts, as SIP revisions on January 24, 1985. 50 Fed. Reg. 3338 (Jan. 24, 1985).

C. The Subsequent Regulations and Pre-NOV Sales

In August, 1985 SCAQMD once more amended Rule 1113 by extending the September, 1985 effective date of the anticipated 380-to-250 g/l limit reduction to September, 1989. SDAPCD also took actions extending its September, 1985 deadline permitting sales of non-flat coatings through August 31, 1987. These and other district deadline extensions were submitted to, and approved by, ARB. They were then submitted to EPA. At all times during 1985, 1986, and 1987, however, EPA delayed taking action thereon.

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[2] As shown below, there were substantial doubts as to the validity of these district adoptions and state approvals under California law. See *Colusa Air Pollution Control District v. Superior Court*, 226 Cal. App. 3d 880, 883-84 (1991).

At various unspecified times between December 3, 1985 and June 24, 1987 Vista and at least 39 other leading California paint manufacturers and retailers offered and sold traditional enamels in SCAQMD, SDAPCD, and throughout California. These products met the 380 g/l limit required in California. No sales were made by Vista on any holidays or Sundays.

At all times during December 1985, 1986, and the first eight months of 1987, SCAQMD and SDAPCD permitted the sale of such enamels. The California paint industry sold such coatings openly and in the belief that such actions were fully proper. At all such times air quality regulators at the local, state, and federal levels were aware of this widespread understanding and practice, and never expressed to members of the paint industry, including Vista, any opinion that the understanding was wrong or that the practice should stop. At all such times the paint industry, based on the advice of counsel, understood that EPA was without authority to enforce the locally superseded, but federally approved, SIP revisions.[3]

D. Interim and Post-Deadline Sales

On June 24, 1987 EPA sent a notice of violation ("NOV") to the 40 leading California paint companies, including Vista, charging violation of one or more of 20 federally approved local district rules. The Vista NOV issued under former Section 113 of the Act, charged that Vista had failed to comply with the superceded versions of SDAPCD Rule 67.0 and SCAQMD Rule 1113, and alleged that Vista was in violation of the applicable SIP.

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[3] See *American Cyanamid Co. v. EPA*, 810 F.2d, 493, 500 (5th Cir. 1987); but also see *General Motors Corp. v. U.S.*, 496 U.S. 530, 541 (1990).

EPA advised the paint industry that it would pursue enforcement action against any company which did not comply with the following schedule:

> "1) Manufacture of non-compliant (>250 g/l) coatings is ceased on or before June 30, 1987, and
>
> "2) Sales of non-compliant coatings is ceased on or before August 31, 1987."

In order to meet the terms of the first part of EPA's "amnesty," Vista totally stopped manufacturing all traditional enamels by July 1, 1987. Between June 24 and August 31, 1987 Vista attempted to sell off its obsolete inventory of such coatings. Vista totally stopped all sales in SCAQMD by September 1, 1987.

Based on discussions with EPA and SDAPCD Vista filed a variance application with SDAPCD on August 31, 1987, and attempted to liquidate its obsolete inventory of traditional enamels in SDAPCD during September, 1987, believing that such conduct was permitted as a result of the variance proceeding. Approximately 70 gallons of traditional enamel were sold by Vista in SDAPCD during the post-deadline period.[4]

At all times during 1987 and thereafter the SIP revisions adopted by various districts and approved by ARB in 1985 remained pending before EPA. EPA did not act thereon until February 2, 1989, when they were disapproved. 54 Fed. Reg. 5236 (Feb. 2, 1989).

E. EPA's Information Request And Vista's Response.

On June 19, 1987 EPA had sent to Vista and the 39 other paint companies letters asking for certain future sales data about non-flat coatings, including the volume

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[4] USA contends, and the judgment holds, that these few post-deadline sales in SDAPCD justify massive penalties with respect to the pre-deadline sales and sales in SCAQMD as well.

which will have been sold in each day of August, September, and October 1987. A report was due on each of six different dates between August 28, 1987 and November 16, 1987. EPA's letter stated that, in the event Vista failed to adequately respond, it intended to pursue "immediate" action in court.

On July 22, 1987, by which time Vista had stopped manufacturing non-flat coatings, EPA sent a second letter containing certain "modifications" to its June 19 information request. That letter, among other things, provided that the August 1987 data could be given by stipulation. It further said:

> ". . . The stipulation must also verify that by July 1, 1987, your company ceased manufacture of these coatings for sale in the 20 districts and that your company intends to cease all sales and offers for sale of these coatings in the 20 districts by September 1, 1987."

On August 4, 1987 Vista sent a letter to EPA making the latter stipulations.

Vista understood that, if manufacturing and selling stopped, no further reporting was required. For these reasons, Vista delivered no sales data to EPA on the six dates. At all times it believed that it had complied with what EPA finally wanted, and it never willfully withheld anything. EPA pursued no "immediate" court action pursuant to EPA's June 19 letter.

Indeed, at no time prior to May 11, 1989 did EPA say anything to Vista about the 1987 information request. On that date, however, respondent United States of America ("USA") wrote to Vista asserting for the first time that Vista had failed to provide the information requested in 1987. Promptly after receipt of that letter Vista took extraordinary steps to provide the sales data. Three Vista employees spent six days reviewing sales tickets in order to determine the estimated sales in

SDAPCD in September 1987. The information was delivered to USA on June 19, 21, and 23, 1989.

On June 23, 1989 USA wrote a letter to Vista. It stated that USA had received from Vista "enough information" to permit it to resolve the matter. At no time thereafter did EPA request more information.

F. EPA's Penalty Policy And USA's Penalty Target

EPA had promulgated and published its Civil Penalty Policy. BNA Environmental Reporter (Federal Laws) 41:2991 (June 1, 1984). This policy set forth in detail the criteria and methodology to be followed by USA in fixing its penalty "target" in a civil enforcement action.

In its June 23, 1989 letter USA also revealed to Vista that it had "calculated a proposed civil penalty of $192,000 based on EPA's Clean Air Act penalty policy." USA calculated its penalty target for paint sales during the pre-NOV interim, and post-deadline periods at $162,000. The major factor in that calculation was the following: "Assuming a sale price of $15 a gallon, and a 2% profit margin, the economic benefit of the unlawful sales was $72,000." USA's June 23, 1989 letter also calculated its proposed penalty target of $30,000 for its information request claim based on the following: "Importance (§ 114 violation): $15,000," to which USA added: "100% upward adjustment for knowing violation and lack of cooperation."

G. The Pleading Order

On December 3, 1990, more than two weeks after the new amendments to the Act took effect, USA, at the request of the EPA, filed a complaint for civil penalties against Vista for alleged violations of the Act relating to the paint sales and to the requests for information.

Vista filed its answer to the complaint on March 28, 1991 asserting various affirmative defenses. As one de-

fense, Vista alleged that in promulgating the 1984 versions of Rule 67.0 and Rule 1113, SDAPCD and SCAQMD had violated, among other things, the provisions of the Code relating to rulemaking,[5] and applicable California statutes mandating environmental impact analysis.[6] As a result of these and other state law violations, Vista alleged, each rule was void *ab initio*[7] and could not be approved by EPA nor enforced by USA. Vista also alleged as affirmative defenses that, in approving the 1984 versions of Rule 67.0 and Rule 1113, ARB violated the above provisions, as well as California's administrative procedure act.[8] As a result, ARB's inclusion of each of Rule 67.0 and Rule 1113 in the SIP was void *ab initio* and EPA could not have approved nor enforced either.[9]

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[5] Under the Code, as in effect in 1984, each district was required to assess and duly consider the economic impacts of the rules. *Western Oil & Gas Assn. v. ARB*, 37 Cal. 3d 502, 507 (1984). Also, a district had no authority to regulate sources not within its statutory jurisdiction. *Western Oil & Gas Assn. v. Orange County Air Pollution Control District*, 14 Cal.3d 411, 415-17 (1975). (The Code was silent about paint until 1988, and even now it is unclear what district authority to regulate paint may be. Code § 41712.)

[6] A district rule regulating the VOC content of house paint is invalid where the district fails to analyze the adverse environmental effects of the use of substitute products in place of the outlawed coatings. *Dunn-Edwards Corp. v. Bay Area Air Quality Management District*, 9 Cal.App. 4th 644, 653-58 (1992).

[7] *Dunn-Edwards*, 9 Cal. App. 4th at 655.

[8] California Government Code § 11340 et seq.; see, *e.g.*, *Goleta Valley Community Hospital v. Department of Health Services*, 149 Cal. App. 3d 1124, 1128-29 (1983).

[9] Vista further alleged that, in approving the superseded version of Rule 67.0 and Rule 1113 as part of the federally approved SIP, EPA violated various provisions of federal law, including the Act, as a result of which EPA's approvals were also void and unenforceable.

Vista concurrently filed a counterclaim for declaratory and injunctive relief against USA raising the same defenses. It also filed a third-party complaint against SCAQMD, SCAPCD, ARB, and EPA alleging, *inter alia*, that the rules USA sought to enforce in the main action had been illegally adopted or approved by SCAQMD, SDAPCD and ARB and were therefore void *ab initio*, as a matter of state law, and unapprovable and unenforceable at the federal level.

On July 24, 1991 the district court granted the third-party defendants' motion to dismiss the third-party complaint, and USA's motion to dismiss Vista's counterclaim and to strike Vista's affirmative defenses challenging the underlying validity of the rules. The court's order stated, among other things, that it lacked subject matter jurisdiction to review the claims raised in the counterclaim and third-party complaint.

H. The Summary Judgment And Its Amendment on Rehearing

On October 25, 1991 USA moved for summary judgment.[10] USA's summary judgment motion was based exclusively, and improperly, on former Section 113(b) of the Act. Former 42 U.S.C. § 7413(b). USA totally ignored the dispositive provision, new Section 113(e) of the Act. 42 U.S.C. § 7413(e).

For example, as to liability for paint sales, USA's brief cited Sections "7413(b)(1)" and "7413(b)(2)" of the former Act. USA presented no evidence nor argument relating to new Section 113(e)(2). That section establishes, first, that the days of violation should only include the day of the NOV and days "thereafter." Second, it provides that, as to the post-NOV period, there

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[10] USA sought a civil penalty of $6,040,000. Neither USA nor EPA has ever purported to explain why it departed from its $192,000 "target" fixed under EPA's civil penalty policy. See *Delaney v. EPA*, 898 F.2d 687, 693 (9th Cir. 1990).

was no liability for "intervening days" during which no sales occurred.[11]

As another example, USA's summary judgment papers, as to liability for information request responses, cited sections "7414(a)(1)" and "7413(b) . . . (4)" of the former Act. EPA offered no evidence nor briefing relating to the second sentence of new Section 113(e)(1) of the Act, in effect since November 1990, which provides that the court shall not assess penalties where the responding party had "sufficient cause" to fail to comply with the requirement.

As a final example, insofar as penalty factors are concerned, EPA incorrectly cited former Section "7413(b)." It attempted no factual nor legal showing under the relevant provision, the first sentence of new Section 113(e)(1), which mandates that "the court . . . shall take into consideration" various factors, including "the economic benefit of non-compliance."

USA submitted to the court proposed findings of fact and conclusions of law. They contained no references to the above new statutory provisions and elements.[12]

The district curt granted summary judgment and signed *verbatim* USA's proposed findings and conclusions on November 18, 1991. The court ruled that Vista had sold traditional enamels unlawfully each and every day between December 3, 1985 and October 12, 1987, including during the pre-NOV period and on every Sunday

[11] USA bore the burden of proving at trial each day of violation. *U.S. v. Chevron U.S.A., Inc.*, 639 F. Supp. 770, 777 (W.D. Tex. 1985); *U.S. v. SCM Corp.*, 667 F. Supp. 1110, 1124-25 (D. Md. 1987); *Landy v. Federal Aviation Administration*, 635 F.2d 143, 147 (2nd Cir. 1981). Section 113(e) imposes certain modifications as to post-NOV violations. But those modifications do not apply retroactively to the sales here. *Southern Railway Co. v. Miller*, 285 F.2d 202, 204-05 (6th Cir. 1960).

[12] Because USA's showing was wholly deficient, Vista was not bound to make a counter-showing on the unaddressed issues. *Adickes v. Kress & Co.*, 398 U.S. 144, 155-56 (1970).

and holiday. The court further ruled that Vista had unlawfully failed to respond to EPA's request for information on each and every day between August 26, 1987 and November 18, 1991 (the day of the summary judgment hearing), including all days after June 23, 1989 when USA had written that it had received from Vista "enough information." [13]

In subsequent proceedings both parties asked the district court to amend the ruling, in one way or another, based on consideration of the new but previously unheard sections of the Act. On rehearing, both sides presented evidence and argument on these issues for the first time, and both sides asked the court for amended, although differing, findings of fact and conclusions of law with respect thereto. See Federal Rules of Civil Procedure, Rules 52, 59, 60.

On the paint sale liability issue, for example, Vista argued that there is no such liability for pre-NOV sales under new Section 113(e)(2) of the new Act, and asked the court for a conclusion of law stating that "[n]o liability exists for paint sales prior to the notice of violation." Vista also put in evidence showing that no sales occurred on Sundays or holidays, and asked for a finding to that effect.

On the issue of liability for failure to respond to information requests, Vista presented evidence showing, that, as a result of Vista's earlier document production, USA had written on June 23, 1989 that it had "enough information" to meet its enforcement needs. Vista's brief argued that Vista had sufficient cause thereafter to refrain from any further production efforts. Vista sub-

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[13] The Court cut USA's request in half and awarded a civil penalty of $3,020,000. The penalty below was unprecedented among reported civil penalty cases under the Act, both in the summary manner of its rendition, and in the severity of its confiscatory impact on the defendant's business. Compare, *U.S. v. Chevron U.S.A., Inc.*, 639 F. Supp. 770 (W.D. Tex. 1985); *U.S. v. SCM Corp.*, 667 F. Supp. 1110 (D. Md. 1987); *U.S. v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122 (D. Colo. 1987).

mitted to the court five proposed findings of fact and one proposed conclusion of law relating to the sufficient cause issue.

On the issue relating to the economic benefit of noncompliance, Vista submitted the above letter in which USA estimated that benefit from the paint sales was "72,000." [14] USA submitted no evidence on rehearing relating to economic benefit. In briefs, its lawyers simply offered an estimate—many times higher than $72,000—based on an assumption, which they conceded was "not precise," that 55% of Vista's income was due to sales of traditional enamels. Vista submitted declarations of its chief executive and chief financial officers showing that USA's lawyers' assumptions were "false," as less than 3% of Vista's income was due to such sales, and that accordingly this estimate was "erroneous," and further showing that both of USA's widely divergent estimates mistakenly failed to account for the offsetting benefits of compliance due to increased sales of substitute products. Vista proposed a new finding of fact to such effect, and another to the effect that it had gained no economic benefit by any delay in providing requested information.

In its brief on rehearing, USA conceded, as follows:

> ". . . Vista correctly states that new Section 113 (e)(1) . . . replaced former Section 113(b) and should apply to this case. . . . [N]ew Section 113 (e)(1) requires consideration of . . . the economic benefit of noncompliance.
>
> ". . . [T]he Court's Findings of Fact and Conclusions of Law should be amended to make a specific conclusion of Law on each additional issue. . . .

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[14] USA argued, and the district court found, that the letter was inadmissible because it contained a settlement proposal. But USA's factual admissions in the letter were admissible. *Gaspard & Co., Inc. v. Government of Guam*, 427 F.2d 276, 278 (9th Cir. 1970); *U.S. v. Reserve Mining Co.*, 412 F. Supp. 705, 712 (D. Minn. 1976).

> Accordingly, the United States will submit under separate cover an amended proposed Findings of Fact and Conclusions of Law for the Court's consideration."

USA did submit such proposed amended conclusions of law on certain of the new issues. They read, in relevant part, as follows:

> "The CAA was amended in November 1990, in part, to add new CAA Section 113(e)(1). . . . In assessing civil penalties, CAA Section 113(e)(1) provides that the Court shall consider . . . the economic benefit of noncompliance. . . .
>
> "The seventh factor, the economic benefit of noncompliance, also supports a substantial penalty against Vista. By its failure to properly respond to EPA's Section 114 requests for information . . . Vista has improperly failed to disclose information which it has or had in its exclusive possession to assess the precise economic benefit to it due to its illegal offer for sale and sale of noncompliant coatings. . . . Vista obtained a significant economic benefit from its illegal offer for sale and sales of non-compliant coatings. . . . Vista has failed to submit admissible evidence to controvert the United States' showing of Vista's significant economic benefit."

On rehearing, the court ruled that Vista's motion was "denied in its entirety with prejudice, except as explicitly set forth below." This followed: "The Court approves and enters amended findings of fact and conclusions of law in the form submitted by the United States."

I. Affirmance Of The Pleading Order

The Ninth Circuit affirmed the pleading order. The Memorandum states (A3), as follows: "As Vista had ample opportunity to submit comments on the inclusion of the local rules in the California state implementation plan ("SIP") pursuant to section 307(d) of the CAA, and to challenge EPA's approval of the inclusion of those

rules in the SIP pursuant to section 307(b)(1) of the CAA, the district court lacked subject matter jurisdiction over the third party complaint, the counterclaim, and the affirmative defenses dealing with invalidity."

J. Affirmance Of The Amended Summary Judgment

The Ninth Circuit also upheld the amended summary judgment rendered on rehearing.[15] However, the Memorandum acknowledges (A6) as follows: "The 1990 Amendments became effective on November 15, 1990. USA filed its complaint on December 3, 1990. Accordingly, the Amendments apply to this case." The Memorandum further states (A7) that Vista's failure to make certain arguments during the summary judgment proceeding was "likely due to the failure of the USA to bring its complaint under the 1990 CAA Amendments."

Nevertheless, the Memorandum rules (A11) that one of the issues "raised for the first time in Vista's post-judgment motion" was "Vista's liability for pre-notice of violation sales," and that, "[a]ccordingly, we refuse to consider" Vista's argument on appeal with respect to that issue. It further states (A4): "Vista did not raise the issue that the dates of the sales were not proven for Sundays and holidays until after summary judgment had been entered."

The Memorandum states (A8) that Vista's contention that USA told Vista that USA had "enough information" on June 23, 1989 "was not raised until the post-judgment action." It states (A5) that Vista's argument that it had "sufficient cause" to act as it did thereafter was "only raised in its post-judgment motion." Again, the Memorandum concludes (A11) that, "[a]ccordingly, we refuse to consider these arguments."

As to any economic benefit of noncompliance, the Memorandum acknowledges (A8-9) that "there may have been a factual dispute as to this issue." But it nonetheless

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[15] It reversed the amended summary judgment on penalty and remanded to the district court for trial thereon.

upheld the district court's conclusion that "Vista failed to submit admissible evidence to controvert USA's showing of Vista's significant economic benefit." [16]

REASONS FOR GRANTING THE WRIT

I. THE MEMORANDUM'S AFFIRMANCE OF THE PLEADING ORDER CONFLICTS WITH THE MAJORITY RULE OF OTHER CIRCUITS HOLDING THAT SECTION 307 OF THE ACT IS NO BAR TO INVALIDITY DEFENSES IN ENFORCEMENT ACTIONS.

The majority of circuits which have considered the question have held or suggested that the prescriptions of Section 307 of the Act establishing judicial review of actions by the EPA in approval of a SIP do not prevent a party from raising as a defense in an enforcement action premised on a violation of the SIP matters which were not within the ambit of the EPA Administrator's review. *Union Electric Co. v. EPA*, 593 F.2d 299, 304 (8th Cir. 1979) (". . . [A] company seeking to have these issues reviewed . . . could present its cause as a defense to any enforcement proceedings initiated by the EPA in federal district court."); *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885, 891 (8th Cir. 1977); *U.S. v. CPS Chemical Co., Inc.*, 779 F. Supp. 437, 454 (E.D. Ark. 1991); *U.S. v. Zimmer Paper Products, Inc.*, 733 F. Supp. 1265, 1270 (S.D. Ind. 1989); *U.S. v. Interlake, Inc.*, 429 F. Supp. 193, 197 (N.D. Ill. 1977) ("Thus Section 307 (b)(1) permits a court of appeals to consider only those matters which the Administrator could consider when it was determined whether to adopt a plan pursuant to Section 110(a)(2)"); *Buckeye Power, Inc. v. EPA*, 481 F.2d 162, 173 (6th Cir. 1973); *Indiana & Michigan Elec-*

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[16] For the reasons stated at footnote 14 above, any factual admission in USA's letter was admissible. In any case, USA introduced no evidence of benefit, but Vista put in two detailed declarations of its officers rebutting the unsubstantiated assertions of USA's lawyers.

tric Co. v. EPA, 509 F.2d 839, 845 (7th Cir. 1975). Indeed, without addressing the question, this Court has recognized certain such rulings. *Union Electric Co. v. EPA*, 427 U.S. 246, 268 n.18 (1976).

Furthermore, the majority of circuits has concluded that a state or local regulation adopted in violation of state law is void *ab initio* and therefore unapprovable by EPA and unenforceable by USA in an enforcement action. *New Mexico Environmental Imp. Div. v. Thomas*, 789 F.2d 825, 833 (10th Cir. 1986) ("When the approved SIP contains an element that is invalidated by virtue of state law, adoption by the EPA is also invalidated"); *Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1151 (7th Cir. 1983); *People v. Celotex Corp.*, 516 F. Supp. 716, 718 (C.D. Ill. 1981).[17]

Conversely, the minority of circuits has suggested that the language of Section 307 bars the raising of the invalidity defense in a federal enforcement action. *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349, 355-56 (3rd Cir. 1972) ("Getty was posing a direct challenge to the regulation . . . Getty was in the wrong court by virtue of section 307 of the Act").[18]

Further, the minority of circuits has held that a provision included in a state implementation plan which was void and unenforceable under state law may still be enforced in a federal action. *U.S. v. Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir. 1987) (". . . [S]uch invalidation cannot be given effect, because invalidation of an EPA-approved SIP may only occur in the federal ap-

[17] "It would be an anomaly, if not a denial of defendant's due process rights, to allow, at this point, full enforcement of those invalid regulations . . . ." 516 F. Supp. at 718.

[18] In discussing the availability of judicial review, however, the court in *Getty* acknowledged: "The Constitution requires an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." 467 F.2d at 356. Vista never got a hearing on its invalidity defenses.

pellate courts on direct appeal from the Administrator's decision under § 7607(b)(1) . . .").

The Memorandum of the Ninth Circuit here follows, although without specific reference thereto, the minority rule as to both the effect of Section 307 and the federal enforceability of an invalid state regulation.[19] This Court should take this opportunity to resolve the above conflict among the circuits and, Vista would argue, resolve it in favor of the majority view.

II. THE MEMORANDUM'S AFFIRMANCE OF THE AMENDED SUMMARY JUDGMENT CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT WHERE A REHEARING IS HELD ON NEW ISSUES BOTH PARTIES ARE ENTITLED TO A HEARING THEREON.

In *Saunders v. Shaw*, 244 U.S. 317 (1917), a landowner sued a drainage district in state court to enjoin collection of a tax. A holder of the district's bonds, which were to be paid out of the proceeds of the tax, intervened to oppose the injunction. At trial the landowner offered evidence to show that his land was outside of the area benefitted by the drainage system. The evidence was excluded, however, as being outside the scope of the landowner's pleadings. Accordingly, the bondholder did not introduce rebuttal evidence. The bondholder prevailed in the trial court. The state appel-

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[19] The references in the Memorandum to Section 307(b)(1) and 307(d) are misplaced. Section 307(b)(1) relates to review of "action of the Administrator," and Section 307(d) also refers to certain types of action "by the Administrator." Here, the thrust of Vista's defenses relates to the unlawful actions of SCAQMD, SDAPCD, and ARB under state law in adopting and approving the two regulations, rather than to the later actions of EPA in approving them under the Act. Thus, the Memorandum fails to address Vista's central contention when it alludes to Vista's "challenge [to] EPA's approval," as opposed to its challenges to the state action of the state actors.

late court initially affirmed, but on rehearing, reversed and granted the injunction based upon the landowner's offered, but neither admitted nor rebutted, evidence. The bondholder's petition for another rehearing was denied under a state procedural rule forbidding a second rehearing. This Court, in an opinion authored by Justice Holmes, reversed, saying:

> ". . . [The bondholder] has been deprived of due process of law, . . . because the case has been decided against him without his ever having had the proper opportunity to present his evidence. . . . [W]hen the trial court ruled that it was not open to the plaintiff to show that his land was not benefitted, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view . . . [W]e . . . cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." 244 U.S. at 319.

In *Armstrong v. Manzo,* 380 U.S. 545 (1965) a woman's second husband petitioned to adopt her daughter. A state statute dispensed with the need for notice to the natural father when he was in arrears for child support. Relying on this statute, the step-father alleged such default, and the hearing proceeded to judgment in his absence. Upon learning of the adoption decree, the natural father moved to set it aside. At the second hearing, he introduced evidence attempting to show that he had not defaulted in his child support obligations. But the court denied his motion and confirmed its prior adoption decree. This Court reversed. It held that the first hearing violated the due process clause for lack of the required notice and that the second failed to cure that constitutional infirmity. The Court said:

> "Had the petitioner been given the timely notice which the Constitution requires, . . . the moving parties would have had the burden of proving their

case . . . [citation]. It would have been incumbent upon them . . . to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could have prevailed.

"Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of non-support made by another judge. . . . [T]here was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter. . . . The burdens thus placed upon the petitioner were real, not purely theoretical. For "it is plain that where the burden of proof lies may be decisive of the outcome." [citation] Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

"A fundamental requirement of due process is 'the opportunity to be heard.' [citation] It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." 38 U.S. at 66-67.[20]

In *Saunders*, the defendant could not argue the location issue at the first hearing, because it had been ruled

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[20] When a statutory scheme makes an element an important factor, the determination ". . . may not, consistently with due process, eliminate consideration of that factor in [the] hearing. The hearing required by the Due Process Clause must be 'meaningful' [citation] and 'appropriate to the nature of the case' [citation]. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard." *Bell v. Burson*, 402 U.S. 535, 541-42 (1971).

immaterial. In *Armstrong*, defendant could not meet the default issue, because he was not there. Here, similarly, Vista was not heard on the Section 113(e) issues at the initial summary judgment hearing, because USA had erroneously attempted to litigate issues under the repealed Act and had ignored the real issues raised under the new Act.

In *Saunders*, the defendant was denied any hearing in which to cure the earlier defect. In *Armstrong*, a rehearing was held, but the harm inflicted on the defendant could not be cured, as the burden of proof had in the meantime effectively shifted. In much the same way, in this case, Vista was denied any real opportunity to litigate the new Section 113(e) issues on rehearing, because the proceeding below was wholly one-sided and the Ninth Circuit "refuse[d] to consider" Vista's evidence and arguments relating to those issues on review.

III. THE MEMORANDUM DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

The civil penalty provisions of the Act hold out "draconian" possibilities. *Union Electric*, 427 U.S. at 272 (Powell, J., concurring). The standards imposed under the Act are complex and controversial, and ever more so. Civil liability is fixed pursuant to prosecution which is quasi-criminal in essence, but lacks the normal safeguards afforded to a criminal defendant. The per day maxima are high, and a clean air violation, by its nature, is usually a multiday event. The threat is especially severe, of course, to a small business.[21]

It is essential that a litigant have its day in court on all dispositive issues. Wihout that, its due process right to a fair hearing has been extinguished.

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[21] Vista had sales of $28,900,000 in its 1986-1987 fiscal year. Its profit during 1990-1991 was $304,567. It employs 400 persons in Southern California.

The pleading order upheld on appeal gutted an essential part of Vista's defense. By it, Vista was denied a hearing on the validity of the very rules USA was so zealously attempting to enforce against it. Mootness, as well as inefficiency, generally render repeated state law challenges to an endless series of local "ghost" rules futile. Further, EPA cannot adjudicate the state law validity issues in the SIP revision approval process, and thus a Section 307 challenge in the Court of Appeals on state law grounds would be similarly useless. The only real opportunity a defendant has to challenge the underlying validity of a superseded, but federally-approved, local rule is when USA attempts to enforce it in a federal enforcement action. This is the only practical rule from the standpoint of judicial economy. The existing split among the circuits relating to the effect of Section 307 on state invalidity defenses in federal enforcement actions should be resolved by this Court. The minority rule applied *sub silentio* in the Memorandum below conflicts directly with the great weigh of authority.

Similarly, USA sought and won a summary judgment in the first motion proceeding which was admittedly defective due to USA's own fundamental error of law. USA acknowledged that the judgment was in need, if possible, of being cured and that necessitated a second hearing. USA attempted the showings required under new Section 113(e) for the first time on rehearing. But because the rehearing conducted in the district court on the new issues, and the review on appeal, was wholly a one-way affair, Vista was effectively denied a hearing on those crucial issues, too.

CONCLUSION

For these reasons, a writ of certiorari should be issued.

Respectfully submitted,

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